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In the

Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; and PINE RIVER BLUFF ESTATES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* ATTAINABLE HOUSING ALLIANCE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

The Attainable Housing Alliance has received the parties written consent to file this brief as amicus curiae in support of the petitioners. Letters of consent have been filed with the Clerk of the Court. Counsel for amicus curiae authored this brief in whole and no other person or entity other than amicus, its members or counsel have made a monetary contribution to the preparation or submission of this brief.

The Attainable Housing Alliance is an association of over 800 members of the Northern Illinois Home Builders Association, the Home Builders Association of the Greater Fox Valley and the Home Builders Association of Greater Chicago. The Attainable Housing Alliance represents a unified voice of the home building industry of northeastern Illinois on issues that affect the attainability and ownership of housing. The instant case could have a profound impact on the regulation of property in Northern Illinois where much of the land is low lying, and therefore, directly concerns all the members of the Alliance.

SUMMARY OF ARGUMENT

Amici submit that *SWANCC* replaced the "hydrological connection" test with the"significant nexus" test, and submit that the a proper reading of what comprises a substantial nexus under *SWANCC* is found in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) and *United States v. Needham*, 354 F.3d 340 (5th Cir. 2003) both of which limit hold that a minimal hydrological connection is not sufficient to confer jurisdiction. To reach Clean Water Act jurisdiction over the wetlands over the Rapano's property, the Corps must claim jurisdiction over all tributaries, however trivial or intermittent. The Corps would in effect, regulate all water in every state, because everything above sea level eventually drains into a navigable waterway. This reaches well beyond the significant nexus between the wetlands and 'navigable waters, and substantially altered the meaning of navigable waters as found in the Clean Water Act.

The Clean Water Act is not so broad as to permit the Corps to impose regulations over tributaries that are neither themselves navigable nor truly adjacent to navigable waters. It is doubtful that Congress authorized the Corps to assert its jurisdiction in such a sweeping and constitutionally troubling manner. Even if that traditional meaning may be stretched, in combination with a broad understanding of "navigable waters," to reach most rivers, streams, and lakes, and waters and wetlands closely related to them, it cannot conceivably apply to a drainage ditch twenty miles removed from a navigable river. This would have far-reaching consequences, and impose severe limitations on a landowner's use of their land.

The term adjacent wetlands as defined by the Corps cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a "significant nexus" between the water in question and the navigable-in-fact waterway. This requires the adjacent body of water be "sufficiently linked" to the navigable-in-fact water. The Carabell property is separated by a man-made berm and is far too attenuated to become waters of the United States within the meaning of the Clean Water Act.

Since the ditch running along the Carabells' property is separated from wetlands only by a man-made berm or barrier. It is logical that this would limit the entrance of any pollution on the property from entering the downstream waters. This would also limit sediment transport from the property to downstream navigable waters. By berming the property a landowner should be able to remove the property from the Corps jurisdiction as this would limit any substantial nexus to the navigable waters. However, the Corps would assert that the manmade berm is jurisdictional. In effect, a landowner is not permitted to enclose the wetlands or creeks on its property. However, if the purpose of the Clean Water Act is to restore and maintain clean water, then this enclosure should be encouraged. Unless the Corps has

converted the Clean Water Act into a wildlife conservation act. If so, this should change should be spelled out by Congress, and not the Corps.

When Congress enacted the Clean Water Act, it attempted to preserve the authority of the States to regulate land use. The Corps regulation prohibit a property owner by enclosing its property from navigable waters which prevents the discharge of pollutants to be controlled at the source by preventing their entry into navigable waters. The severe federal intrusion into areas of traditional state and local control by the Corps is not consistent with Congress' effort to preserve the State land use authority. The Corps usurpation of local land use, can only be justified by a clear statement of congressional intent. Not only is such a statement lacking in the Clean Water Act, but Congress made explicit in the Act its intention to preserve state and local land use regulation.

The Corps limitless jurisdiction intrudes upon traditional local authority to control the use, development, and preservation of land and water resources that Congress expressly recognized in the Clean Water Act. The Corps regulatory authority under § 404 of the Clean Water Act has limits, and those limits forbid its regulatory authority over the enclosure of small intrastate ditches, miles from navigable waters. The Corps also does not have regulatory authority to regulate the enclosure of property where the runoff does not reach navigable waters.

ARGUMENT

I. THE PROPER JURISDICTIONAL ANALYSIS UNDER THE CLEAN WATER ACT REQUIRES A SIGNIFICANT NEXUS WELL BEYOND THE MOST MINIMAL HYDROLOGICAL CONNECTION.

A. Clean Water Act.

In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire. Congress responded to that dramatic event by enacting the Clean Water Act, 33 U.S.C. §§ 1251-1387 ("Clean Water Act"). Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), prohibits "any person" from discharging "any pollutant," including "dredged or fill material," into "navigable waters" without obtaining a permit from the Corps. The Clean Water Act defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). However, "the waters of the United States" is not defined.

The Clean Water Act directs the EPA to adopt guidelines, in conjunction with the Corps, for administering § 404 dredge and fill permits. 33 U.S.C. § 1344(b)(1). The Corps guidelines are codified at 33 C.F.R. Parts 320-29 (2004).[3] The Corps defines the term "waters of the United States" in 33 C.F.R. 328.3(a). The relevant definition include: "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," § 328.3(a)(1); "tributaries of [these] waters," § 328.3(a)(5); and "wetlands adjacent to [these] waters [or their tributaries]," § 328.3(a)(7).

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[3] The EPA's guidelines under the Clean Water Act are codified at 40 C.F.R. Part 230. Since the EPA and the Corps have identical provisions, citation is only provided to the Corps regulations. Also, all statutory references to C.F.R. are to (2004) unless noted otherwise.

The Clean Water Act defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). The phrase "navigable waters" and "waters of the United States" remain closely intertwined, and the tributary of a navigable water is also intertwined with the word navigable waters. The word navigable does not get subsumed by the word tributary. In indicating the reach of the Clean Water Act, Congress used the words "the waters of the United States" as opposed to "all water within the United States." The statutory language carves out a subset of federally regulated waters "the waters of the United States" from the larger set of "all water" within the nation's borders. Though the Clean Water Act uses the phrase "waters of the United States" rather than "navigable waters of the United States," that phrase is used to define the term "navigable waters."

Nonetheless, the Corps has wrenched the word of its plain meaning and stepped outside its statutory boundaries, and has steadfastly expanded its authority under the Act into a mandate to regulate every drop of water in the country.[4]

B. *SWANCC* Requires a Substantial Nexus Beyond a Mere Hydrological Connection.

The Corps jurisdictional expansion was limited to some extent when this Court construed the phrase "the waters of the United States" under the Clean Water Act in *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). *SWANCC* created a split among the federal courts as to how the ruling should be interpreted. Some courts have adopted an overly narrow reading allowing the Corps to regulate every drop, while others have properly read *SWANCC* broadly consistent with this Courts opinion.

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[4] Permit applications have involved wetlands as small as 26 square feet, about the size of an office desk. V. Albrecht & B. Goode, *Wetland Regulation in the Real World* 21 (1994).

In *SWANCC* a consortium of municipalities surrounding Chicago sought to build a landfill in land that had been used decades earlier for sand and gravel mining. *Id.* at 163. Once the mining ceased the excavation areas filled with water and became permanent and seasonal ponds. *Id.* The municipalities sought a permit to fill the ponds. *Id.* The Corps denied the permit because the non-navigable and isolated ponds had become the home of migratory birds, and under the Corps "Migratory Bird Rule" the ponds were "waters of the United States" and fell within the Corps jurisdiction. *Id.* at 164-65. This Court explained that a significant nexus must exist between the regulated wetlands and navigable waters:

> It was the **significant nexus** between the wetlands and "navigable waters" that informed our reading of the [Clean Water Act] in *Riverside Bayview Homes*. . . . In order to rule for [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to **ponds that are *not* adjacent to open water**. But we conclude that the text of the statute will not allow this.
>
> Indeed, the Corps' *original* interpretation of the [Clean Water Act], promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations . . . emphasized that it is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor. . . .
>
> *SWANCC*, 531 U.S. at 167-68 (emphasis added).

The *SWANCC* Court also noted that the "Corps' *original* interpretation" of the Clean Water Act "promulgated two years after its enactment" is much different than the Corps "new regulations." *Id.* at 168. The Court concluded that neither the text of the statute nor its legislative history supported the Corps'

assertion of jurisdiction over the non-navigable ponds. *Id.* at 170-171. The Court also declined to extend the ruling in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) to isolated ponds:

> We thus decline [the Corps] invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. . . . We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited import" and went on to hold that § 404(a) extended to **non-navigable wetlands adjacent to open waters**. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what **Congress had in mind** as its authority for enacting the [Clean Water Act]: its traditional **jurisdiction over waters that were or had been navigable in fact** or which could reasonably be so made.
>
> *SWANCC*, 531 U.S. at 171-72 (emphasis added).

The *SWANCC* majority noted that "where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 172. The Court found "nothing approaching a clear statement from Congress" that it intended to reach non-navigable isolated ponds. *Id.* at 174. The Court concluded that 33 C.F.R. § 328.3(a)(3) (1999), as applied to the property pursuant to the migratory bird rule "exceeds the

authority granted to [the Corps] under § 404(a) of the [Clean Water Act]." *Id.* at 174. Since the ponds were not "waters of the United States" the development was allowed to proceed without federal interference. *Id.*

The *SWANCC* dissent points out, that even the most seemingly isolated wetlands are in fact both hydrologically and ecologically connected to navigable waters. *SWANCC*, 531 U.S. at 176 n.2 (Stevens J., dissenting). Nonetheless, the majority still refers to the wetlands as isolated. This leads the majority to conclude that the Corps jurisdiction does not extend to "ponds that are *not* adjacent to open water." *SWANCC*, 531 U.S. at 167-68. The dissent cogently, if disapprovingly, described the effect of *SWANCC* in its dissent as follows: "the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps assertion of jurisdiction over all waters **except for actually navigable waters, their tributaries and wetlands adjacent to each**." *SWANCC*, 531 U.S. at 176-77 (Stevens J., dissenting). The dissent also noted that after *SWANCC* "intermittent rivers, streams, tributaries" that "are not contiguous or adjacent to navigable waters" are outside the scope of the Clean Water Act. *Id.* at 189.

C. Adjacent Wetlands Must Require a Significant Measure of Proximity to Navigable Waters to Confer Clean Water Act Jurisdiction.

Amici submit that *SWANCC* replaced the "hydrological connection" test with the"significant nexus" test. The Sixth Circuit appears to give this lip service. The Sixth Circuit explained in *United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004) that Clean Water Act jurisdiction over "adjacent wetlands" requires a significant nexus between the wetlands and navigable waters, "which can be satisfied by the presence of a hydrological connection." However, *Rapanos* Court finds that

even the most minimal hydrological connection between that water and navigable waters is sufficient to confer jurisdiction. The Sixth Circuit has reinserted the hydrological connection test by holding that a hydrological connection confers a significant nexus.

This Court should reject the Sixth Circuit's view that even the most minimal hydrological connection between that water and navigable waters is sufficient to confer jurisdiction. The Fifth Circuit has lead the charge in applying a proper reading of what comprises a substantial nexus under *SWANCC*. In *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) the court addressed whether an oil company was liable for the damage to the plaintiffs land from a series of small "discharges that occurred over a considerable period of time" by "ground and surface waters" into "a small seasonal creek" which runs into a navigable river. *Id.* at 265.

The *Rice* Court address groundwater and surface water separately, and found that "ground waters are not protected waters under" the Clean Water Act. *Id.* at 269 (citation omitted). With regards to surface waters the court relied on *SWANCC* to conclude "a body of water is subject to regulation under the [Clean Water Act] if the body of water is actually navigable or is adjacent to an open body of navigable water." *Id.* at 269 (citing *SWANCC*, 531 U.S. at 680). The court noted that the streams the plaintiff sought to protect were "intermittent streams which only infrequently contain running water" and often have "no running water at all." *Id.* at 270.

The *Rice* Court found a lack of evidence that the non-navigable creek is "**sufficiently linked** to an open body of navigable water" to permit jurisdiction, and it would be an "unwarranted expansion" to apply jurisdiction to intermittent streams. *Id.* at 271. The court also found a lack of "evidence of a close, direct and proximate link between" the discharges and

"any resulting actual, identifiable" contamination of a "particular body of natural surface water that satisfies the jurisdictional requirements." *Id.* at 272.

The Fifth Circuit continued its proper reading of *SWANCC* in *United States v. Needham* (*In re Needham*), 354 F.3d 340 (5th Cir. 2003) where oil was "discharged into the drainage ditch" that spilled into a tributary that flows into an "industrial waterway that eventually flows into the Gulf of Mexico." *Id.* at 343. The trial court found that the "neither the drainage ditch" nor the tributary are navigable waters and not "sufficiently adjacent to the navigable waters" and that the spill was therefore "not subject to federal regulation." *Id.* The government argued that its regulatory definition of "navigable waters" includes all "tributaries" of navigable-in-fact waters which covers all waters, excluding groundwater, that have any hydrological connection with "navigable water." *Id.* at 345. The Fifth Circuit refused to bless the government's expansive definition of tributaries:

> In our view, this definition is unsustainable under *SWANCC*. The [Clean Water Act] and the [Oil Pollution Act] are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor **truly adjacent to navigable waters**. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water."

Needham, 354 F.3d at 345-46 (citing *Rice*, 250 F.3d at 269).

The *Needham* Court noted that the government's

definition of tributaries would push the "outer limits of the *Commerce Clause* and raise serious constitutional questions" and that *SWANCC* "rejected such an expansive reading of the" Clean Water Act. *Id.* at 346 n.8. The *Needham* Court observed that: "Under *Rice*, the term "adjacent" cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a **"significant nexus" between the water in question and the navigable-in-fact waterway**." *Id.* at 347.

The *Needham* Court interpreted the Corps definition of "adjacent" to require a significant measure of proximity to navigable waters, in the following passage:

> The Army Corps of Engineers defines "adjacent" to mean "bordering, contiguous, or neighboring." *33 C.F.R. § 328.3*. However, this regulation was invalidated, at least in part, in *SWANCC*. Nevertheless, the Corps' definition comports with the term's plain meaning. Webster's Third New International Dictionary 26 (1986) offers several definitions: "(a) not distant or far off: nearby but not touching; (b) relatively near and having nothing of the same kind intervening: having a common border: abutting, touching: living nearby or sitting or standing relatively near or close together; and (c) immediately preceding or following with nothing of the same kind intervening." Hence, both the regulatory and plain meaning of **"adjacent" mandate a significant measure of proximity**. Therefore, **including all "tributaries" as "navigable waters"** would negate *Rice's* adjacency requirement, and extend the [Clean Water Act] **beyond the limits set forth in *SWANCC***. *Id.* at 347 n.12 (emphasis added).

Amici submit that the analysis from the Fifth Circuit (*Rice* and *Needham*) applies the correct reading of this *SWANCC* which replaced the "hydrological connection" test with the"significant nexus" test and a minimal hydrological connection between is not sufficient to confer jurisdiction. Otherwise runoff hundreds of miles from navigable waters will confer jurisdiction, allowing the Corps to regulate every drop of water in the United States.

D. Twenty Miles Is Not a Significant Measure of Proximity between the Wetlands on the Rapanos Property and the Navigable Waters to confer Clean Water Act Jurisdiction.

The District court in *U.S. v. Rapanos*, 190 F. Supp. 2d 1011 (ED MI 2002) correctly noted that petitioner Rapano's "property is not directly adjacent to a navigable body of water; it is over twenty miles from Saginaw Bay, and it roughly twenty miles from where the Kawkawlin River -- the nearest body of navigable water -- becomes navigable." *Id.* at 1012. The "nearest body of navigable water to [the Rapanos'] property is roughly **twenty linear miles away**." *Id.* at 1015 (emphasis added).

To reach Clean Water Act jurisdiction over the wetlands over the Rapano's property, the Corps must claim jurisdiction over all tributaries, however trivial or intermittent. The Corps would in effect, regulate all water in every state, because everything above sea level eventually drains into a navigable waterway. This is light of the plain reading of the Clean Water Act which used the words "the waters of the United States" as opposed to "all water within the United States."

The words of Chief Justice Rehnquist's are instructive: it is "the significant nexus between the wetlands and 'navigable waters'" that must inform our reading of the [Clean Water Act].

SWANCC, 531 U.S. at 168. Because, as Justice Stevens points out, [*SWANCC*] has substantially altered the meaning of "navigable waters" in the [Clean Water Act], a "significant nexus" must constitute more than a mere "hydrological connection." *SWANCC*, 531 U.S. at 176-77 (Stevens J., dissenting). The Sixth Circuit has essentially ignored this Court's instructions and maintain the hydrological connection status quo.

The Corps regulations do not define tributary.[5] Hence, it must be given its common and ordinary meaning. The common, roadside drainage ditch bordering property cannot be reasonably construed in common parlance to be a tributary. Even if, however, the ditch can be said to be a "stream" and therefore a tributary, it is not a tributary twenty miles from a navigable river. The attenuated link between the wetlands on the Rapanos property and the navigable river precludes labeling the runoff from the wetlands as a tributary. The main ditch on the Rapanos property does not qualify as a tributary because it is not contiguous or adjacent to navigable waters. The argument that navigable waters includes all tributaries of navigable waters is unsustainable under *SWANCC*.

The Clean Water Act is not so broad as to permit the Corps to impose regulations over tributaries that are neither themselves navigable nor truly adjacent to navigable waters. It is doubtful that Congress authorized the Corps to assert its jurisdiction in such a sweeping and constitutionally troubling manner. Even if that traditional meaning may be stretched, in combination with a broad understanding of "navigable waters,"

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[5] The Corps 1975 regulations define "Primary tributaries" as "the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries." 33 C.F.R. 209.120(d)(2)(ii)(e).

to reach most rivers, streams, and lakes, and waters and wetlands closely related to them, it cannot conceivably apply to a drainage ditch twenty miles removed from a navigable river. This would have far-reaching consequences, and impose severe limitations on a landowner's use of their land.

II. THE PROPER JURISDICTIONAL ANALYSIS UNDER THE CLEAN WATER ACT DOES NOT CONFER JURISDICTION IF THE WETLANDS LACK ANY CONNECTION TO NAVIGABLE WATERS.

A. The Clean Water Act Does Not Extend to Wetlands Adjacent to Nonnavigable Tributaries Where the Runoff Does Not Enter The Nonnavigable Tributaries.

SWANCC affirmed that it "was the **significant nexus** between the wetlands and navigable waters that informed [its] reading of the [Clean Water Act] in *Riverside Bayview Homes*." *SWANCC*, 531 U.S. at 167. The significant nexus was found in *Riverside Bayview Homes* because the wetland were "actually abut[ting]. . . a navigable waterway." *Riverside Bayview*, 474 U.S. at 131, 135.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) a developer sought to build a housing development on 80 acres by filling wetlands on property "**adjacent** to a body of **navigable water** . . . Black Creek, a navigable waterway." *Id.* at 131. The "property is part of a wetland that **actually abuts on a navigable waterway**." *Id.* at 135. The issue was "limited" to whether the Corps could "exercise jurisdiction over wetlands adjacent" to navigable waters. *Id.* at 131. The opinion twice expressly declined to hold that the Corps may exercise jurisdiction over "wetlands that are

not adjacent to bodies of open water." *Id.* at 131-32 n.8 and 124 n.2.[6]

The majority opinion in *SWANCC* repeatedly refers to the wetlands at issue in that case as "isolated" despite the fact that, as the dissent points out, even the most seemingly 'isolated' wetlands are in fact both hydrologically connected, as well as ecologically connected, to navigable waters. *SWANCC*, 531 U.S. at 176, n.2 (Stevens J., dissenting). The dissent notes that the wetlands are at least ecologically connected and "anything but isolated." *Id.* Despite this, the majority still refers to the wetlands as isolated. This lead the *SWANCC* majority to conclude that even if there is a hydrological connection, the wetlands are isolated for purposes of the Clean Water Act. *Id.* at 171-72.

B. The Drainage Ditch Along Carabell's Property Is Not Adjacent to Navigable Waters.

The Sixth Circuit noted in *Carabell v. U.S. Army Corps*, 391 F.3d 704 (6th Cir 2004) that when the ditch was excavated on the Carabell's property "the spoils were cast to either side of the ditch, creating upland berms approximately four feet wide along the banks of the ditch. The berm edging the Carabells' property serves to **block immediate drainage of surface water out of the parcel into the ditch**." *Id.* at 705 (emphasis added). The Carabell property is adjacent to a ditch which connects to tributaries of navigable waters, however, the ditch on "Carabells' triangle-shaped property is separated from wetlands only by a

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[6] The Supreme Court did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *Riverside Bayview Homes*, 474 U.S. at 131-32 n.8. Also, "wetlands not necessarily adjacent to other waters" 33 C.F.R. §§ 328.3(a)(2) and (3) was "not now before" the court. *Id.* at 124 n.2.

man-made berm or barrier." *Id.* at 708. The Sixth Circuit concluded that the wetlands on the "Carabells' property are separated from a tributary of 'waters of the United States' only by a man-made berm or barrier, they are considered 'adjacent wetlands' under § 328.3(a)(7). As such, the wetlands at issue in this case fall within the jurisdiction of the Corps for purposes of the CWA." *Id.* at 709.

The wetland in *Riverside Bayview Homes* served "to filter and purify water draining into adjacent bodies of water." *Id.* at 134-35. However, wetlands on Carabell's property "block immediate drainage of surface water out of the parcel into the ditch." *Carabell*, 391 F.3d at 705. There is no nexus with the navigable river. The runoff on the Carabell's property does not reach the navigable river, and the lack of nexus with the navigable river is certainly not significant.

The term adjacent cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a "significant nexus" between the water in question and the navigable-in-fact waterway. This requires the adjacent body of water be "sufficiently linked" to the navigable-in-fact water. The Corps regulations define "adjacent" as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c). However, the connection between the drainage ditch and the Carabell property is separated by a man-made berm and is far too attenuated to become waters of the United States within the meaning of the Clean Water Act. The attenuated connection between the ditch enclosure and the waters of the United States is significant evidence that the drainage ditch is not adjacent.

The Clean Water Act provides for jurisdiction over "navigable waters," defined as "waters of the United States." Nothing in that language, other provisions of the Clean Water Act, or legislative history shows a clear indication or

unmistakable intention to reach waters that are not connected to navigable waters.

Since the ditch running along the Carabells' property is separated from wetlands only by a man-made berm or barrier. It is logical that this would limit the entrance of any pollution on the property from entering the downstream waters. This would also limit sediment transport from the property to downstream navigable waters. By berming the property a landowner should be able to remove the property from the Corps jurisdiction as this would limit any substantial nexus to the navigable waters. However, the Corps would assert that the manmade berm is jurisdictional. In effect, a landowner is not permitted to enclose the wetlands or creeks on its property. However, if the purpose of the Clean Water Act is to restore and maintain clean water, then this enclosure should be encouraged. Unless the Corps has converted the Clean Water Act into a wildlife conservation act.[7] If so, this should change should be spelled out by Congress, and not the Corps. The *SWANCC* majority noted that "where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC* at 172.

Any connection between the runoff from the property and navigable waters is highly attenuated at best, and the drainage ditch on the property could be deemed a tributary by wrenching the word of its plain meaning, and thereby stepping outside the Corps statutory and constitutional boundaries.

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[7] The "Clean Water Act is not a comprehensive wildlife protection statute. Although the Act mentions wildlife as an important result of controlling pollution, the purpose of the Act is to restore and maintain clean water, not to conserve wildlife." *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310, 1322 (7th Cir. 1992), vacated, 975 F.2d 1554, adopted, 999 F.2d 256, 262 (7th Cir. 1993) (Manion, J., concurring).

C. Federal Jurisdiction over Adjacent Wetlands must Be Scrutinized Carefully Because Land Use is an Area of Traditional Local Control.

In enacting the Clean Water Act, Congress never suggested that it intended to usurp traditional local authority over all surface drainage courses, or that it intended to upset the federal-state balance by regulating all waters and wetlands, however trivial and far removed from any navigable waterbody. Congress did not intend to sweep within federal jurisdiction, all surface runoff, however minuscule or intermittent, within the country. This effects a massive intrusion of federal power into land use decisions that by tradition are the province of the States. Nonetheless, the Corps is now attempting to direct local development activities, e.g., the enclosure of ditches, and the grading of soil for homebuilding.

When Congress enacted the Clean Water Act, it attempted to preserve the authority of the States, stating that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b).

However, the Corps regulation prohibit a property owner by enclosing its property from navigable waters. This clearly prevents the discharge of pollutants to be controlled at the source by preventing their entry into navigable waters. Unfortunately, if a property owner seeks to encircle his land with berms so that the waters no longer leave his property, the man-made berms do not prevent the Corps jurisdiction.

This confirms the severe federal intrusion into areas of traditional state and local control by the Corps. Congress clearly tried to strike a careful balance, asserting federal authority where

necessary to protect strictly federal interests, while promoting a voluntary federal-state partnership in matters beyond the reach of the federal government, and preserving State authority elsewhere. The Corps usurpation of local land use, can only be justified by a clear statement of congressional intent. Not only is such a statement lacking in the Clean Water Act, but Congress made explicit in the Act its intention to preserve state and local land use regulation.

While Congress intended the Clean Water Act to encompass "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *Riverside Bayview*, 474 U.S. at 133, there is no reason to believe that in using the familiar terms "navigable waters" and "waters of the United States," Congress suddenly meant to regulate all drainage flows. There simply is no statutory support for the claim that federal jurisdiction extends over all drainways in the nation, or that a parcel of land can be regulated by the Corps as long as rain falling in the area "eventually" drains downstream via a roadside drainage ditch. Indeed, it is beyond belief that Congress ever could have envisioned the Clean Water Act being applied to assert federal jurisdiction to regulate common, every-day roadside drainage ditches simply because of an ultimate connection to a far-off navigable waterway. Such an intrusion, and on such a monumental scale, into a matter of such long-standing state and local concern would, if intended, surely have been mentioned in the legislative process. It was not.

Given its "particular duty to ensure that the federal-state balance is not destroyed" with respect to "traditional concern[s] of the States." *United States v. Lopez*, 514 U.S. 549, 580-581 (1995) (Kennedy, J., concurring). By prohibiting the development of land which seeks to close itself from navigable waters, the Corps is able to bar projects that have been approved by state and local authorities based on the Corps view that they do not comport with the "public interest." 33 C.F.R. § 320.4(a).

See *Lopez*, 514 U.S. at 564 ("if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.")

The Corps limitless jurisdiction intrudes upon traditional local authority to control the use, development, and preservation of land and water resources that Congress expressly recognized in the Clean Water Act. The Corps utterly limitless assertion of federal jurisdiction obliterates any "distinction between what is truly national and what is truly local," *Lopez*, 514 U.S. at 564, 568. The Corps aggrandizement of its own authority to regulate man-made berms which prevent water from flowing to navigable rivers is clearly not found in the Clean Water Act.

III. CONCLUSION.

The Corps regulatory authority under § 404 of the Clean Water Act has limits, and those limits forbid its regulatory authority over the enclosure of small intrastate ditches, miles from navigable waters. The Corps has not shown any discernible effect on interstate commerce, much less a substantial one, caused by enclosing small intrastate ditches. The Corps does not have § 404 authority to regulate the enclosure of property where the runoff does not reach navigable waters, or where the runoff travels many miles from navigable waters. The judgment of the Sixth Circuit should be reversed in both cases before this Court and judgment should be entered on behalf of the petitioners.

Respectfully submitted,

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